

STATE OF MICHIGAN
COURT OF APPEALS

RUTH JARRETT-COOPER,

Plaintiff-Appellant,

v

ROBERT ROSETT, RYAN ROSETT, PREMIUM
GOLF, L.L.C., and DIVERSIFIED PROPERTY
GROUP, L.L.C.,

Defendants-Appellees.

UNPUBLISHED

March 20, 2014

No. 312958

Wayne Circuit Court

LC No. 09-023639-CZ

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' emergency motion to dismiss plaintiff's complaint for failure to disclose claims in her Chapter 13 Bankruptcy. We affirm.

I. JUDICIAL ESTOPPEL

Plaintiff first contends that the trial judge erred in applying the doctrine of judicial estoppel to plaintiff's claim. We disagree.

Defendants moved to dismiss plaintiff's claim pursuant to MCR 2.116(C)(7) and (10). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition is proper under MCR 2.116(C)(7) when a claim is barred. *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 432; 824 NW2d 318 (2012). In reviewing a ruling pursuant to subrule (C)(7), this Court considers all documentary evidence submitted by the parties, and accepts as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. *Id.* at 432-433.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). A genuine issue

of material fact exists when, after viewing the evidence in the light most favorable to the nonmoving party, the record leaves open an issue upon which reasonable minds may differ. *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013). Further, judicial estoppel is an equitable doctrine, and “[w]hen reviewing equitable actions, this Court reviews the trial court’s decision de novo.” *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012).

Judicial estoppel is an equitable doctrine which generally prevents a party from prevailing on an argument and then relying on a contradictory argument to later prevail in a separate proceeding. *White v Wyndham Vacation Ownership, Inc*, 617 F3d 472, 476 (CA 6, 2010). This doctrine is meant to “preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.” *Browning v Levy*, 283 F3d 761, 776 (CA 6, 2002) (internal quotation marks omitted). Under this “prior success model” of judicial estoppel, if a party “*successfully* and unequivocally” asserts a position in a prior proceeding, they are estopped from asserting an inconsistent position in a subsequent proceeding, *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994) (emphasis in original), but it does not require the party against whom the judicial estoppel doctrine is invoked to “have prevailed on the merits,” *Spohn*, 296 Mich App at 480, quoting *Reynolds v Internal Revenue Comm’r*, 861 F2d 469, 473 (CA 6, 1988).

In *Spohn*, this Court held that to support a finding of judicial estoppel in the bankruptcy context a reviewing court must find that:

(1) [the plaintiff] assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) [the plaintiff’s] omission did not result from mistake or inadvertence. [*Id.* at 480-81, quoting *White*, 617 F3d at 477-478.]

This Court held that a bankruptcy filing, made under oath, which did not include notice of a potential sexual harassment law suit was sufficient to show the first requirement: assumption of a contrary position. *Id.* at 481. The debtor need only have sufficient information to suggest that she may have a possible cause of action and any claim with potential must be disclosed to the bankruptcy court. *Id.* at 482. Regarding the second requirement, “adoption,” it must only be shown that the bankruptcy court confirmed the debtor’s plan. *Id.* at 483. Finally, to establish plaintiff’s lack of mistake or inadvertence, this Court considers whether “(1) she lacked knowledge of the factual basis of the undisclosed claims; (2) she had a motive for concealment; and (3) the evidence indicates an absence of bad faith.” *Id.* (internal quotation marks omitted).

A. CONTRARY POSITION

As to the first element, plaintiff had sufficient information to suggest that she may have a possible cause of action against defendants. Attached to defendants’ emergency motion was the voluntary bankruptcy petition filed by plaintiff. In that petition, plaintiff made no mention of any potential or forthcoming lawsuit against defendants, and the petition asked about any assets or property that plaintiff might have. This petition was filed on August 4, 2008, and plaintiff’s bankruptcy proceedings were not dismissed until November 3, 2009. In the interim, plaintiff

filed a complaint in the instant matter. Under the United States Bankruptcy Code, plaintiff was required to disclose any pending or potential lawsuits, as they are “routinely recognized [as] . . . an asset that must be included under 11 USC § 521(a)(1)(B)(i).” *Spohn*, 296 Mich App at 481. This duty to disclose is a continuing one, therefore, plaintiff was required to amend her bankruptcy petition once she knew of the potential lawsuit. *Id.* at 482. Thus, plaintiff’s failure to disclose her potential lawsuit in her voluntary bankruptcy petition was sufficient to meet the first element of judicial estoppel.

B. ADOPTION BY BANKRUPTCY COURT

The second element, that the bankruptcy court must have adopted the contrary position, is established if the bankruptcy court confirmed the debtor’s plan, either as a preliminary matter or as part of a final disposition. *Id.* at 483. Neither party disputes that the bankruptcy court adopted plaintiff’s contrary position, and the trustee’s report confirms the adoption. Therefore, the second element of judicial estoppel is also met.

C. MISTAKE OR INADVERTENCE

The third element is established if it is shown that “plaintiff’s omission did not result from mistake or inadvertence.” *Id.* (internal quotation marks omitted). As noted above, to establish lack of mistake or inadvertence, courts consider whether “(1) she lacked knowledge of the factual basis of the undisclosed claims; (2) she had a motive for concealment; and (3) the evidence indicates an absence of bad faith.” *Id.* (internal quotation marks omitted).

Lack of knowledge is determined by considering whether “plaintiff lacked knowledge of the factual basis of the undisclosed claims.” *Id.* at 484 (internal quotation marks omitted). Plaintiff’s own affidavit in this matter shows that she was aware of her contractual relationship with defendants and the potential contract claim and possibility of a lawsuit as early as December, 2006. Plaintiff then filed her voluntary bankruptcy petition on August 4, 2008. Further, plaintiff stated that she was again approached by her brother, the attorney in this matter, in late-summer of 2009 regarding the possibility of filing suit against defendants. Plaintiff’s bankruptcy case was not dismissed until November 3, 2009. “Given the continuing nature of her disclosure obligation, [plaintiff] cannot successfully contend that she was unaware of her potential claim.” *Id.*

The next issue to consider for lack of mistake or inadvertence is concealment. In *Spohn*, this Court held that in the bankruptcy context, a presumption of a motive to conceal exists because it is generally in a Chapter 13 petitioner’s interest to minimize income and assets in order to obtain direct payment for the assets instead of payment to the debtor’s estate. *Id.* at 485. Like in *Spohn*, plaintiff’s failure to initially disclose her potential lawsuit, or ever amend her petition while her bankruptcy was still pending, suggests a motive for concealment. Plaintiff contends that because she filed suit only after acquiescing to her brother’s demands, it cannot be said that her omission of the suit from her bankruptcy petition was an attempt to reserve any proceeds for *her* benefit. This contention is insufficient to overcome the presumption of motive for concealment this Court elucidated in *Spohn* because it is still plaintiff who would recover should this suit become fruitful.

The third and final consideration in determining if the party against whom estoppel is sought has a lack of mistake or inadvertence is absence of bad faith. In determining if a party has an absence of bad faith, this Court looks to “the plaintiff’s ‘attempts’ to advise the bankruptcy court of the omitted claim.” *Id.* at 487, citing *White*, 617 F3d at 478. Plaintiff contends that this Court should not find that attempts to advise the bankruptcy court are the only way to demonstrate an absence of bad faith because then any person who omits a lawsuit because of lack of knowledge would not know of the lawsuit in order to disclose it, and therefore, could never demonstrate such an absence of bad faith. While this Court is inclined to agree, this contention is irrelevant to the instant case. Plaintiff filed her voluntary bankruptcy petition on August 4, 2008. Further, plaintiff stated that she was again approached by her brother in late-summer of 2009 regarding the possibility of filing suit against defendants. Plaintiff’s bankruptcy case was not dismissed until November 3, 2009. Therefore, plaintiff did have knowledge of the instant lawsuit and still failed to attempt to advise the bankruptcy court of the potential claim. Plaintiff further argues that her failure to disclose the lawsuit was the result of her lack of knowledge regarding the requirement to disclose a lawsuit which she did not intend to pursue. But as this Court stated in *Spohn*, “ignorance of the law is no excuse.” *Id.* at 488. Therefore, “alleged lack of knowledge of the duty to disclose is not a defense to failing to fulfill that duty,” *id.*, and plaintiff has not shown an absence of bad faith. Because plaintiff cannot show lack of knowledge, had a motive for concealment, and could not provide evidence that indicates a lack of bad faith, this Court should find that plaintiff’s omission did not result from mistake or inadvertence. Therefore, the trial court properly found that judicial estoppel barred plaintiff’s claim and granted summary disposition in defendants’ favor.

II. THIRD CIRCUIT LCR 2.119(B)(2)

Plaintiff next contends that the trial court erred in addressing defendants’ motion on substantive grounds, when it failed to comply with local court rules. We disagree.

“For an issue to be preserved for appellate review it must be raised, addressed, and decided by the lower court.” *Hines v Volkswagen of America, Inc.*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Plaintiff argued, in her motion for reconsideration and at the corresponding motion hearing, that defendants’ emergency motion to dismiss failed to comply with Third Circuit LCR 2.119(B). The trial court denied plaintiff’s motion for reconsideration, but did not explicitly address plaintiff’s contention that defendants did not comply with the local court rule. Appellate consideration of an issue raised before the trial court, but not specifically decided by the trial court, is not precluded. *Loutts v Loutts*, 298 Mich App 21, 23-24; 826 NW2d 152 (2012). Therefore, appellate review of this issue is proper.

The proper application and interpretation of a court rule is a question of law that this Court reviews de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 283; 807 NW2d 407 (2011). However, in general, “[f]indings of fact by the trial court may not be set aside unless clearly erroneous.” MCR 2.613(C).

Third Circuit LCR 2.119(B)(2) states, in pertinent part:

The moving party must ascertain whether a contemplated motion will be opposed.
The motion must affirmatively state that the concurrence of counsel in the relief

sought has been requested on a specified date, and that concurrence had been denied or has not been acquiesced in, and hence, that it is necessary to present the motion.

On the praecipe attached to defendants' motion, defendants' attorney attested to the following form certification:

I certify that I have made personal contact with Ernest L. Jarrett, Plaintiff's counsel on 05-24-12 regarding concurrence in relief sought in this motion and that concurrence has been denied or that I have made reasonable and diligent attempts to contact counsel regarding concurrence with the motion.

This form certification, with blank spaces provided for opposing counsel's name and the date of contact, is provided on every praecipe filed in Wayne Circuit Court, and therefore, is sufficient, by the trial court's own standards, to at least meet the formal, written requirements of that court's own rules.

Regarding defense counsel's actual attempts to comply with the concurrence requirement, the parties argued the issue of defense counsel's compliance with the local rule at length. Plaintiff's attorney proffered affidavits of office staff stating that defense counsel never attempted to contact his office in the manner or at the time he stated. Defense counsel countered by stating that he did call plaintiff's attorney and sent a follow-up fax the next morning, as well as reminding the trial court of the numerous previous complaints he had made regarding his difficulty in getting a response from plaintiff's attorney. In its opinion and order, the trial court addressed plaintiff's motion on the merits, thereby implying that the trial judge accepted defense counsel's contention that he attempted to contact plaintiff's attorney in order to ascertain his opposition to the motion. This Court must give regard "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). Therefore, because defense counsel fulfilled the formal requirements of Third Circuit LCR 2.119(B)(2), this Court will not disturb the trial court's finding that defense counsel's statements regarding his attempts to contact plaintiff's attorney were credible. Further, plaintiff cannot show any resulting prejudice even if defendants had failed to comply with the local rule. As defendants' motion was a dispositive motion, it is unlikely plaintiff would have concurred in the motion given the chance. Therefore, the trial court did not err in finding that defendants complied with the local court rule, and addressing their motion on the merits.

Affirmed.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan